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NOTES

LIABILITY OF OWNERS AND OCCUPIERS OF LAND

Several jurisdictions have recently abolished the traditional distinction between trespassers, licensees and invitees in determining whether owners or occupiers of land are liable to persons who come upon the land and receive injuries. In these jurisdictions ordinary negligence rules will determine whether the owners or occupiers are liable for the injuries.¹ Other jurisdictions, including Wisconsin, still adhere to the traditional approach of separate and distinct duties of care owed to trespassers, licensees and invitees.² However in these jurisdictions recent decisions point toward a potential change in judicial attitude.³

Whether the traditional approach creates problems of interpretation and classification should be evaluated to determine if a change in the law is necessary. If such a change is needed, a determination must be made as to the form that change should take and as to the kind of entrants on land to which that change should apply.

I. COMMON LAW DEVELOPMENT

Distinctions among duties of care owed to trespassers, licensees and invitees developed because of the privileged positions held by medieval landowners in feudal society.⁴ The basic premise was that a person should be allowed to use his land without the burden of watching for and protecting those who entered it without permission or a legal right to do so.⁵

Rigid application of the common-law trespasser, licensee, and invitee categories, however, produced harsh results in some cases, and judicial reluctance to deny a person recovery because of these categorizations developed along with the attitude that human life and its protections is more valuable than a person's right to unre-

1. See, e.g., *Rowland v. Christian*, 69 Cal. 2d 89, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Mile High Fence Co. v. Radovich*, 175 Col. 537, 489 P.2d 308 (1971).

2. W. PROSSER, *LAW OF TORTS* 399 (4th ed. 1971).

3. See *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 218 N.W.2d 129 (1974).

4. *Edwards & Jerome, The Foreseeable Emergence of the Community Standard*, 51 DENVER L. REV. 145 (1974).

5. PROSSER, *supra* note 2, at 359.

stricted freedom in the use of his land.⁶

Because of the reluctance to deny a person recovery, duties were imposed upon landowners to some classes of entrants upon lands. Generally, for some trespassers and all licensees there developed a duty to warn of latent defects—those defects on the land unknown to and not reasonably discoverable by the entrant.⁷ Knowledge by an owner or occupier of frequent trespass on a limited portion of his land was held to increase his duty of care as to that portion. In addition, where trespass was foreseeable and where the land was used for dangerous activities, a higher degree of care was required.⁸ For child-trespassers, the attractive nuisance doctrine developed. Under this doctrine, a duty was imposed to exercise reasonable care to eliminate dangerous conditions creating extraordinary risks of harm to children.⁹

In some jurisdictions the invitee category was broadened to extend the ordinary negligence standard to social invitees—persons encouraged to enter the land by words or conduct of the owner or occupier, regardless of any economic benefit—and to public invitees—persons invited to enter the land as members of the public and to use the land for a public purpose.¹⁰ This extension was made because it was decided that an invitation carried with it the implied guarantee that the premises were reasonably safe.¹¹

II. DEVELOPMENT OF THE LAW IN WISCONSIN

A. Trespassers

A trespasser is one who enters another's premises without an express or implied invitation from the other person, and solely for his own pleasure, advantage or purpose.¹² In *Frederick v. Great Northern Railway*,¹³ the court held that a possessor or occupier of land owes no duty to a trespasser except to refrain from inflicting wilful or wanton injuries.¹⁴

Wisconsin case development, however, illustrates a trend toward avoiding application of this narrow duty of care. One such

6. *Id.*

7. Edwards & Jerome, *supra* note 4.

8. PROSSER, *supra* note 2, at 361.

9. *Id.* at 373.

10. *Id.* at 388.

11. *Id.* at 389.

12. Wis. J.I.—CIVIL INST. No. 8012.

13. 207 Wis. 234, 241 N.W. 363 (1932).

14. See also *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 76 N.W.2d 355 (1956).

concept was the attractive nuisance doctrine. As early as 1913, in *Kelly v. Southern Wisconsin Railway*,¹⁵ a special attitude developed toward child-trespassers. The court stated that anyone who maintains a dangerous object or condition accessible and attractive to children owes a duty of ordinary care to prevent injury to them.

The Wisconsin Supreme Court's reluctance to deny an injured plaintiff recovery in a compelling situation has manifested itself in the court's unwillingness to categorize one as a trespasser. In a safeplace case, for example, the court held that an employee of a lessee, who had rented only a portion of a warehouse, was a "frequenter" of the entire warehouse. The court determined that although the accident occurred on a portion of the premises not leased to the tenant, the employee might reasonably and frequently go there in the performance of his work.¹⁶ By so interpreting questions of fact, the court was able to avoid the trespasser category and to allow recovery under Wisconsin Statute section 101.11.

The reluctance to characterize a plaintiff as a trespasser was also demonstrated in *Wendt v. Manegold Stone Co.*¹⁷ where the plaintiff was to supervise the set up of a machine on the defendant's premises. Without authorization from the defendant, the plaintiff came onto the premises to look at the machine and was injured. The court held that the plaintiff was a licensee rather than a trespasser, implying a license from the negotiations of the parties regarding the machine.

The court has also avoided the trespasser designation by holding that a person upon the land of another is not a trespasser if he is there with the consent of the owner, or if the person's presence is reasonably anticipated and the person is perceived in a situation of possible danger.¹⁸ In *Baumgart v. Spierings*,¹⁹ for example, the court determined that the defendant was aware that his neighbors' children frequently entered his land. When one of the children was injured, the court imposed the duty of ordinary care and said, "The record does not show any consent given to Karen [the minor plaintiff] to enter upon the defendant's land, but the consent may

15. 152 Wis. 328, 140 N.W. 60 (1913); see also *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 254 N.W. 351 (1934); and *Fitzgerald v. Ludwig*, 41 Wis. 2d 635, 165 N.W.2d 158 (1969).

16. *Tomlin v. Chicago, Mil., St. P. & Pac. Ry.*, 220 Wis. 325, 265 N.W. 72 (1936).

17. 240 Wis. 638, 4 N.W.2d 134 (1942).

18. PROSSER, *supra* note 2, at 362.

19. 2 Wis. 2d 289, 86 N.W.2d 413 (1957).

be implied from the conduct of the owner, from the relationship of the parties, or by custom."²⁰ In this situation of the known or tolerated trespasser, the owner or occupier of the land has a duty to use ordinary care to avoid injuring him.²¹

The development of Wisconsin law with respect to trespassers indicates a judicial reluctance to deny recovery. Damages for injuries have been awarded as a result of the court's refusal to classify the injured entrant as a trespasser upon the premises.

B. Licensees

A licensee is one who goes upon another's premises with express or implied permission, for a purpose unconnected with the business of the owner and which is of advantage only to the entrant or to a third person other than the owner.²² The licensor's duty is limited to avoidance of injury to the licensee by means of a trap or as a result of the licensor's active negligence.

In *Flintrop v. Lefco*,²³ which held that a social guest in one's home is a licensee rather than an invitee, the court said a licensor is liable for injuries caused by (1) a trap on the premises or by (2) his active negligence. A trap, the court said, is a danger known to the licensor, but concealed from the licensee, and which involves an unreasonable risk of bodily harm. The licensor has a duty to warn of the trap's existence, unless it is opened, unconcealed and obvious. "Active negligence" involves the carrying on of some operation or activity in a negligent manner.²⁴ A condition of the premises, such as a visible shoescraper on a patio, whether created through an affirmative act of a defendant or by natural causes, is not active negligence.²⁵

In order to broaden the scope of duties owed to a licensee, a court would have to examine the relationship between the plaintiff and the defendant, determine that the plaintiff, due to some particular fact, such as the finding of an implied invitation,²⁶ has become more than a licensee, and impose the higher, reasonable care standard upon the defendant.

20. *Id.* at 293, 86 N.W.2d at 415.

21. PROSSER, *supra* note 2, at 362.

22. WIS. J. I.—CIVIL INST. NO. 8011.

23. 52 Wis. 2d 244, 190 N.W.2d 140 (1971).

24. *Kaslo v. Hahn*, 36 Wis. 2d 87, 153 N.W.2d 33 (1967).

25. *Id.*

26. See *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927); *Prince v. United States*, 185 F. Supp. 269 (E.D. Wis. 1960).

C. Invitees

A person who expressly or impliedly is invited upon another's premises for the purpose of aiding, transacting, assisting or furthering the business of the other, or who is on the premises for a purpose mutually beneficial to himself and to the possessor of the premises, is an invitee.²⁷ To classify one as an invitee there must be (1) an oral or written invitation, or an implied invitation created by acquiescence of the possessor or by acts on his part which could lead a reasonable man to believe the possessor desired his presence on the premises, and (2) an advantage to the defendant alone or to both the plaintiff and the defendant created by the plaintiff's presence. The advantage need not be direct, immediate or measurable in money.²⁸

An invitor, according to *Stamberger v. Matthaidess*,²⁹ is not an insurer,³⁰ but he owes a duty of ordinary care to the invitee not only as to the physical condition of the premises, but also as to known hazardous conduct of other persons on the premises.³¹

As for the duty of the invitee to protect himself, the court, in *Zehren v. F.W. Woolworth Co.*,³² held a person such as a store customer is not required to see every defect or danger which is plainly observable, nor to remember the existence of every defect or hazard of which he has knowledge, especially when his attention is attracted by a display of merchandise. Here the plaintiff, distracted by a greeting-card display, backed into the aisle and tripped over a scale in plain view. The customer, said the court, is required only to act as a reasonably prudent man under the circumstances.³³ This is a question of fact to be determined on the issue of contributory negligence.³⁴

Traditionally, the invitor-invitee relationship was based upon a mutuality of economic interests.³⁵ In *Schlicht v. Thesing*,³⁶ the

27. Wis. J. I.—CIVIL INST. No. 8010.

28. *Id.*

29. 37 Wis. 2d 186, 155 N.W.2d 88 (1967).

30. The statement that the owner or occupier is not an insurer of the premises means that he or she has a duty only to exercise reasonable care and is not liable for all injuries on the premises.

31. See also *Prince v. United States*, 185 F. Supp. 269 (E.D. Wis. 1960).

32. 11 Wis. 2d 539, 105 N.W.2d 563 (1960).

33. *Id.* at 542, 105 N.W.2d at 565.

34. *Id.* at 545, 105 N.W.2d at 566.

35. *Schroeder v. Great Atl. & Pac. Tea Co.*, 220 Wis. 642, 265 N.W. 559 (1936).

36. 25 Wis. 2d 436, 130 N.W.2d 763 (1964).

Wisconsin Supreme Court took a more liberal view.³⁷ According to the court, a purely business relationship is no longer an essential prerequisite of invitee status. As long as a person is on the premises by invitation and his presence benefits the invitor, he is an invitee. This rule was adopted to protect the gratuitous, good samaritan mother-in-law who babysits on the premises as a favor to the owner, and who inevitably tumbles down the basement stairs after mistaking the stairway door for a closet door.³⁸

A unique question of premises liability is raised by the Wisconsin "berry-picking" statute,³⁹ which is designed to promote the availability of private lands for public recreational use.⁴⁰ An owner, lessee or occupant of a premises owes no duty under the statute to keep the premises safe for entry or use by others for recreational purposes.⁴¹ Permission to hunt, fish or engage in other activities upon the land does not carry with it the assurance that the premises are safe for those purposes.⁴² However, liability is imposed for wilful failure to guard against or warn about a danger or where entrance for recreational purposes is granted for "valuable consideration." In such cases, there is a positive duty to keep the premises safe and to warn of danger.⁴³

Two recent cases have limited this statutory immunity by narrowly construing it and by broadly defining the category of invitee. These cases illustrate situations in which the court has generously set the boundaries of the invitee category to prevent loss of recovery by a plaintiff who might otherwise be a licensee.

The plaintiff in *Copeland v. Larson*,⁴⁴ was severely injured in a dive off a resort's swimming pier. He had paid no admission price to swim and had purchased nothing at the resort's food store. However, evidence showed that swimmers, in general, accounted for a substantial part of the store's business. The court, in finding the plaintiff an invitee, defined an invitee as one who enters another's premises to the benefit of the other, or who enters and shares some mutuality of interest with the owner or occupier. The court also stated that a valuable consideration "may be the confer-

37. RESTATEMENT (SECOND) OF TORTS § 332 (1965).

38. 25 Wis. 2d 436, 130 N.W.2d 763 (1964).

39. WIS. STAT. § 29.68 (1973).

40. *Garfield v. Wis.*, 297 F. Supp. 891 (W.D. Wis. 1969).

41. WIS. STAT. § 29.68(1) (1973).

42. WIS. STAT. § 29.68(2) (1973).

43. WIS. STAT. § 29.68(3) (1973).

44. 46 Wis. 2d 337, 174 N.W.2d 745 (1970).

ring of a benefit upon the landowner or a mutuality of interest of the landowner and entrant. In such cases the common-law duty of ordinary care . . . is not altered by sec. 29.68 excepting for the express exclusion therein stated."⁴⁵

In *Goodson v. City of Racine*,⁴⁶ the court stated that any statute in derogation of the common law must be strictly construed to be consistent with legislative intent. Therefore, the court further limited section 29.68 by holding that the section was not intended to apply to and thus protect governmental units as landowners.

A party injured on state recreational land, for example, would not be barred from suit by section 29.68 and would have a cause of action against the appropriate state employees for negligence in the performance of their duties. If liability were proven, the employees would be shielded from monetary loss by Wisconsin Statute section 270.58, which authorizes the state to pay any adverse judgment.⁴⁷

III. TREND IN WISCONSIN

Strict adherence to the three common law classifications has not been altogether feasible, as is indicated by the development of exceptions to strict categorization. Even by utilizing exceptions, trial courts have encountered problems in making the classifications workable. These problems can be grouped into three general areas: (1) the classifications fail to promote a basic policy of the law and a basic social value—that human life is more important than property and that a person should be held responsible for injuries to others resulting from his own negligence; (2) the traditional distinctions are confusing and subject to inconsistent application; and (3) the use of classifications usurps the function of the jury.

The California Supreme Court in recently highlighting the first problem area of protecting human life stated:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending

45. *Id.* at 347, 174 N.W.2d at 749.

46. 61 Wis. 2d 554, 213 N.W.2d 16 (1973).

47. *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974).

upon such matters, and to focus upon the status of the injured party as a trespasser, licensee or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.⁴⁸

In its approach to personal injury cases, Wisconsin has generally expressed a similar view that a person has a duty to act in a reasonable manner so as to avoid injury to another human being.⁴⁹ Where negligent conduct does occur and results in injury, the policy of Wisconsin tort law has been to provide compensation for the injured person. One may ask why, with regard to possessors of land, the law departs from these fundamental concepts.

*Muench v. Heinemann*⁵¹ illustrates the inconsistency between the current system of classifying duties and the basic policies of the law. The plaintiff was injured in an elevator mishap while making a regular milk delivery to building employees. He sued the owner of the building for negligent maintenance of the elevator, but was denied recovery because the court held he was a mere licensee. The court said because the plaintiff was on the premises to transact business with the defendant's employees, the defendant had no direct or indirect interest and, as a result, the plaintiff could not qualify as an invitee. Such a decision contributes little to the goals of protection of human life, compensation of injury and promotion of safety-consciousness among property owners.

The second problem area is the inconsistency created by the traditional distinctions. For example, one who trespasses once and is injured will be denied recovery. When one trespasses enough times to make his presence known to the landowner, he becomes a licensee and is owed a greater duty of care.⁵²

One commentator has reasoned that the traditional framework creates inconsistencies in an attempt to attain justice:

48. *Rowland v. Christian*, 69 Cal. 2d 89, 100, 70 Cal. Rptr. 97, 103, 443 P.2d 561, 568 (1968).

49. *Johnson v. Prideaux*, 176 Wis. 375, 187 N.W. 207 (1922); *Brady v. Chicago & N.W. Ry.*, 265 Wis. 618, 62 N.W.2d 415 (1954); *Thomas v. Kells*, 53 Wis. 2d 141, 191 N.W.2d 872 (1971).

50. *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 131 N.W.2d 48 (1965).

51. 119 Wis. 441, 96 N.W. 800 (1903).

52. *Bernardi, Loss of the Land Occupiers' Preferred Position—Abrogation of the Common Law Classification of Trespasser, Invitee, Licensee*, 13 ST. LOUIS U. L. J. 449 (1969).

. . . [T]he existing exceptions and judicial extentions which pervade the common-law rules manifest a basic confusion surrounding the application of those rules and are symptomatic of an attempt to attain justice in the individual case while working within a system of law which frustrates the attainment of that end. This confusion and inequity in the area of occupier's liability stems from an attempt to apply old common-law principles in a society which no longer holds the landowner sacrosanct. . .⁵³

That commentator concluded that achievement of logical and legal consistency is "impossible when the existing standards must be misapplied to obtain the desired end."⁵⁴

An English Law Reform Committee report,⁵⁵ which resulted in the Occupiers' Liability Act of 1957,⁵⁶ concluded:

We think . . . that the existing distinctions between licensees and invitees based on the presence or absence of some material interest on the part of the occupier, or, alternatively, of some material interest common to occupier and visitor is untenable as a rational ground for fixing the occupier with a higher duty of care towards the former than towards the latter . . . The present law embarrasses justice by requiring what is essentially a question of fact to be determined by reference to an artificial and irrelevant rule of law.⁵⁷

The third major shortcoming of the present classifications involves the usurpation of the jury function. With the classifications that presently exist many cases may be decided as matters of law on summary judgment or by directed verdict. As a result, the fundamental question of whether the possessor of land acted negligently never reaches the jury. The jury is thus prevented from applying a community standard in weighing the reasonableness of the conduct of the possessor as well as the entrant.⁵⁸ The avoidance of the classification system could conceivably permit judges to submit more cases to the jury, without having to determine the plaintiff's status as a matter of law on summary judgment.

The Wisconsin Supreme Court recognized the three problems

53. Stites, *Liability of a Land Occupier to Persons Injured on His Premises: A Survey and Criticism of Kansas Law*, 18 KAN. L. REV. 161, 162 (1969).

54. *Id.*

55. Cmd. No. 9305, at 31 (1957).

56. 5 & 6 Eliz. 2, c. 31 § 2 (1957).

57. Cited in McDonald & Leigh, *The Law of Occupiers' Liability and the Need for Reform in Canada*, 16 U. TORONTO L.J. 55, 65 (1965).

58. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 103 (D.C. Cir. 1972).

of traditional classification in *Terpstra v. Soiltest, Inc.*,⁵⁹ decided in May, 1974. The plaintiff was injured while sitting in a building under construction. Despite evidence that he was on the construction site with permission, the jury found that the plaintiff was a trespasser. The court upheld the verdict on appeal because the plaintiff, who claimed licensee status, failed to show the existence of a trap or to prove active negligence by the defendant. Although *Terpstra* raised the issue of whether to adopt a reasonable man standard, the court refused to consider the issue and instead upheld the use of the traditional distinctions. Justice Heffernan, writing for the majority, however, stated:

We are aware of the recent trend in other states toward the abolition of the common law distinctions between trespasser, licensee and invitee in terms of the land owner's obligations. [citations omitted]

We choose, however, not to consider the abandonment of the traditional rule in this case. If a change is to be considered, it should be on the basis of a record made at trial, where appropriate motions are made and instructions requested that will trigger the exercise of the trial judge's decision on the question as it may apply to a particular case.⁶⁰

It is clear from the language of the decision, that, given the proper case, the court would consider a change in the present law. In fact at least one Wisconsin trial court has responded to the Supreme Court's invitation. The defendant homeowner in *Antoniewicz v. Reszczybski*⁶¹ demurred to the plaintiff's complaint on the ground that the plaintiff, injured in a fall on icy steps, was a mere licensee whose injury resulted from an unconcealed defect. The trial judge, after discussing the common law justification for categorization of entrants upon the land, the socio-legal changes which have undermined this justification, and the possible effects of a change upon Wisconsin tort law, overruled the defendant's demurrer. In so ruling, the judge said that although no active negligence was alleged, the rule of ordinary care applied.⁶²

Thus in Wisconsin the Supreme Court has indicated a willingness to review the traditional classifications as a basis for determining the liability of owners and occupiers of land. At least one trial

59. 63 Wis. 2d 585, 218 N.W.2d 129 (1974).

60. *Id.* at 593, 218 N.W.2d at 133.

61. Case No. 418-027 (Milwaukee County Cir. Ct., Aug. 12, 1974).

62. *Id.* at 21.

court has adopted the more modern trend and expressly rejected the traditional rule.

IV. CHANGES ELSEWHERE

In other jurisdictions, the trespasser, licensee and invitee triad has come under attack. The United States Supreme Court, in *Kermarec v. Compagnie Generale Transatlantique*,⁶³ held that common law distinctions involving premises liability would not be recognized in admiralty cases governed by maritime law. In justifying this decision, the court said:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards imposing on owners and occupiers a single duty of reasonable care in all circumstances.⁶⁴

Since *Kermarec*, common law distinctions have been abolished in other jurisdictions.

These distinctions have also been abrogated by legislation. England and New Zealand⁶⁵ ended the distinction between licensees and invitees with the Occupiers' Liability Act of 1957.⁶⁶ The Alberta Institute of Law Research and Reform, in 1970, proposed a similar statute for Alberta.⁶⁷ The liability act imposes a "common duty of care" toward all persons "invited or permitted" by the occupier to be upon his land, and allows the parties to

63. 358 U.S. 625, 630 (1959).

64. *Id.* at 630.

65. McDonald & Lee, *supra* note 57. The Occupiers' Liability Act was adopted by Scotland in 1960.

66. 5 & 6 Eliz. 2, c. 31, § 2 (1957).

67. Alexander, *Occupiers' Liability: Alberta Proposes Reform*, 9 ALBERTA L. REV. 89 (1970).

exclude or modify liability by express agreement. No mention is made of trespassers, so apparently the traditional view was unchanged in this respect. In the United States, Connecticut has legislated change by fixing a reasonable care standard for social guests, as well as for business invitees.⁶⁸

In the jurisdictions which have abolished the traditional classification, the critical factor has been the adoption of the view that the preservation of life overrides the sanctity of property. In *Smith v. Arbaugh's Restaurant, Inc.*,⁶⁹ the plaintiff, a restaurant inspector, slipped and injured himself in the defendant's restaurant. The jury decided for the defendant, after being instructed to determine whether the plaintiff was a business invitee or a licensee, and thus whether the defendant owed him a duty to keep the premises reasonably safe or to warn of known, concealed dangers. The plaintiff appealed the finding of licensee status, and the United States Court of Appeals for the District of Columbia reversed, stating ". . . we do not believe the rules of liability imposed by courts in the eighteenth century are today the proper tools with which to allocate the costs and risks of loss for human injuries."⁷⁰ The court rejected the idea of determining liability based on the status of the entrant.⁷¹

This court has frequently recognized that questions which involve moral and empirical judgments are best handled by representatives of the community as a whole. . . . Therefore, in the absence of legislative action to the contrary, we believe that the most effective way to achieve an allocation of the costs of human injury which is acceptable to the community is to allow the jury to function under the standard of "reasonable care under all circumstances."⁷²

Another jurisdiction rejected the common law classification in *Rowland v. Christian*.⁷³ The plaintiff had severed tendons and nerves in his hand when the faucet on the defendant's bathroom sink came apart. The defendant had knowledge of the defect before the accident, had asked her landlord to repair it and had failed to warn the plaintiff, who was a guest in her apartment. The trial court granted summary judgment for the defendant on the ground

68. CONN. GEN. STAT. REV. § 52-557a (1969).

69. 469 F.2d 97 (D.C. Cir. 1972).

70. *Id.* at 99.

71. See also *Cooper v. Goodwin*, 478 F.2d 653 (D.C. Cir. 1973).

72. 469 F.2d at 102.

73. 69 Cal. 2d 89, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

that the plaintiff was a mere licensee who took the premises as he found them. The California Supreme Court reversed on appeal after finding that immunities from liability based on the common law classifications "often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land."⁷⁴

The factor which should be considered to determine the immunity question are, according to the court, "the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance."⁷⁵ The proper test, the court said, was whether the occupier acted as a reasonable man in view of the probability of injury to others,⁷⁶ and concluded that "although the plaintiff's status as a trespasser, licensee or invitee may in the light of facts giving rise to such status have some bearing on the question of liability, the status is not determinative."⁷⁷ This ruling, however, did not apply to trespassers.

Two cases have discussed the question of foreseeability.⁷⁸ In *Mile High Fence Co. v. Radovich*,⁷⁹ the plaintiff policeman, walking his nighttime beat, stepped into a fence post hole on land adjoining an alley and injured his knee. The Colorado Supreme Court held that "it is the foreseeability of harm from the failure by the possessor to carry on his activities with reasonable care for the safety of the entrants which determines liability."⁸⁰

In *Mounsey v. Ellard*,⁸¹ the Massachusetts court said that under the facts of the case, it could rest its decision on the narrow

74. 69 Cal. 2d at 99, 70 Cal. Rptr. at 103, 443 P.2d at 567.

75. *Id.* at 567.

76. See also *Brennan v. Cockrell Investments*, 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973).

77. 69 Cal. 2d at 100, 70 Cal. Rptr. at 104, 443 P.2d at 568.

78. Hawaii adopted a similar position in *Pickard v. City and County of Honolulu*, 452 P.2d 445 (1969), and in *Gibo v. City and County of Honolulu*, 459 P.2d 198 (1969), for all persons reasonably anticipated to be on the premises, regardless of their legal status. In *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972), the Minnesota court declined to make any change regarding the duty owed to trespassers, but did wipe out all licensee-invitee distinctions.

79. 175 Colo. 537, 489 P.2d 308 (1971); see also *Hurst v. Crowtero Boating Club, Inc.*, 31 Colo. App. 9, 496 P.2d 1054 (1972) and *Polster v. Griff's of America, Inc.*, ____ Colo. App. ____, 514 P.2d 80 (1973).

80. 175 Colo. ____, 489 P.2d at 314.

81. ____ Mass. ____, 297 N.E.2d 43 (1973).

ground that the plaintiff was an "implied invitee." The court decided, however, not to indulge in illogical legal fictions created to avoid the harshness of the law.⁸² The court did not expand the duty to include protection of trespassers and said, "Our decision merely prevents the plaintiff's status as a licensee or invitee from being the sole determinative factor in assessing the occupier's liability."⁸³

As a guideline in determining reasonableness and foreseeability, the court suggested that the trier of fact examine the plaintiff's purpose in entering the premises, his manner of entry, his conduct while on the premises, and the defendant's consent or lack of consent.⁸⁴

According to proponents of change, the presence of all entrants, even within the same class, is not equally foreseeable. For example, the presence of a constant trespasser is more foreseeable than the presence of a one-time trespasser. Use of the reasonable man standard would simplify the decision-making process of making foreseeability of a person's presence on the land one factor to consider in determining reasonableness.⁸⁵ As Justice Cardozo said in *Palsgraf v. Long Island RR.*,⁸⁶ "[T]he risk reasonably to be perceived defines the duty to be obeyed."⁸⁷

In countering this connection, some courts have held that the classifications are useful, that exceptions to the general rule can be made whenever necessary,⁸⁸ and that a single standard is, therefore, unnecessary. Second, it is argued that courts alone should not make a classification change. Justice Burke, dissenting in *Rowland*, said that "Sweeping modifications of tort liability fall more suitably within the domain of the Legislature. . . ."⁸⁹ On the other hand, the court in *Smith v. Arbaugh's Restaurant, Inc.*

82. ____ Mass. ____, 297 N.E.2d at 48.

83. ____ Mass. ____, 297 N.E.2d at 52.

84. *Id.* See also *Sargent v. Ross*, ____ N.H. ____, 308 A.2d 528 (1973), wherein the court, following *Mounsey*, held that a landlord must exercise reasonable care to avoid harm to his tenants and must take responsibility for injuries caused by a defective condition on the leased premises.

85. PROSSER, *supra* note 2, at 399.

86. See *Werth v. Ashley Realty Co.*, ____ N.D. ____, 199 N.W.2d 899 (1972); *Di Gildo v. Caproni*, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969); *Robles v. Severyn*, 19 Ariz. App. 61, 504 P.2d 1284 (1973).

87. *Edwards & Jerome*, *supra* note 4, at 161.

88. 248 N.Y. 339, 162 N.E. 99 (1928).

89. *Id.* at 341, 162 N.E. at 100.

90. *Werth v. Ashley Realty Co.*, ____ N.D. ____, 199 N.W.2d 899 (1972).

91. 69 Cal. 2d at 102, 70 Cal. Rptr. at 106, 443 P.2d at 569.

stated that in the absence of contrary legislation, the court had the duty to resolve this problem.⁹²

Justice Burke argued also that a major change would "open the door to potentially unlimited liability,"⁹³ thereby increasing the amount of litigation and the likelihood of verdicts favorable to plaintiffs. It has been pointed out, in response to this argument, that legitimate claims by injured parties rarely have been abandoned on the basis of status alone, that an ordinary-care standard has been used in all other negligence-personal injury cases, that juries generally have assessed well the actions of reasonable men,⁹⁴ and that a plaintiff, successfully blocked in one direction, will use one of the many common law distinctions to qualify for and to demand recovery.

Another question raised is whether the shift to a reasonable man standard in all circumstances would, in effect, require the property holder to be the insurer of his premises. In explaining the duty owed to an invitee, Wisconsin Civil Jury Instruction No. 8020 makes it clear that the owner or occupier is not the guarantor of the safety of all those who come upon the premises. His duty is to exercise ordinary care by keeping the premises reasonably safe, and any liability on his part will be reduced by the amount of the plaintiff's contributory negligence. It should be noted also that low cost liability insurance is generally available to protect the homeowner or lessee under such circumstances.

Those in favor of change contend that use of a single standard will relieve the courts of time-consuming determinations of the claimants' status and will eliminate some of the inconsistencies within which the courts often find themselves entrapped. Opponents say the courts still will be forced to determine status in deciding reasonableness and will continue to develop refinements and distinctions with each new situation that arises.⁹⁵ Even if this latter point proves to be true, the courts will, at the very least, be relieved of the burden of making status determinations as a matter of law and will be able to send the cases to the juries, with status to be considered as one question of fact.

92. 469 F.2d at 102.

93. 69 Cal. 2d at 102, 70 Cal. Rptr. at 106, 443 P.2d at 569.

94. A. Heinrichs, *Constructive Knowledge of Defective Condition is Imposed Upon Landowner*, 5 ST. MARY'S L.J. 621 (1973).

95. R. Britton, *Common Law Distinctions Between Licensee, Invitee and Trespasser are Abolished in California and Replaced by a Standard of Ordinary Care*, 14 VILLANOVA L. REV. 360 (1969).

If a case is allowed to reach the jury on a reasonable-care basis, some critics of change fear that the standard will vary tremendously with each set of facts and with each jury. They argue also that the public attitude toward property rights differs in rural and in urban areas.⁹⁶ On the other hand, it may be fair to say that many jury verdicts are no more or no less accurate than court-rendered decisions and that, in any event, the jury best represents the prevailing attitudes of the community in which the case is tried. Where the jury errs or obviously exceeds reasonable limits, the court may adjust accordingly on motions after verdict.

Finally, even if it is agreed that the case should go to the jury to apply the reasonable man standard, a problem arises as to how the jury should be instructed. Will the ordinary care test be used for trespassers, licensees and invitees, or will it be applied only to the latter two categories?

V. FORMAT FOR AND EFFECT OF CHANGE IN WISCONSIN

If, as the Wisconsin Supreme Court indicates in *Terpstra*,⁹⁷ it would weigh proposals for change in Wisconsin premises liability law, consideration must be given to the form this change would take and the effect it would have on other closely related areas of the law.

The narrowest approach would be to broaden the category of invitees and the corresponding duty of reasonable care to include social guests, who enter the premises by invitation but do not bring to the owner or occupier any direct or indirect benefit.⁹⁸ Inconsistencies and problems in the handling of other licensees and trespassers would, however, still remain.

The court in *Rowland*,⁹⁹ for example, could have expanded the invitee classification to include all persons invited upon the land, it could have enlarged the concept of active negligence to include the facts of the case, or it could have remanded the case to the trial court with an instruction to find the existence of a hidden trap.¹⁰⁰ All such steps would have guaranteed the plaintiff a favorable verdict, but the court avoided the temptation for fear of locking

96. Edwards & Jerome, *supra* note 4, at 166.

97. 63 Wis. 2d 585, 218 N.W.2d 129 (1974).

98. Alexander v. Gen. Acc., Fire and Life Assur. Corp., ____ La. ____, 98 So. 2d 730 (1957).

99. 69 Cal. 2d 89, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

100. Note, 44 N.Y.U.L. Rev. 426 (1969).

itself into a pattern that would create further confusion.

Most of the trend setting cases limit expansion of the reasonable man standard to licensees, either by expressly excluding or by failing to mention trespassers. This development reflects the prevailing attitude toward the trespasser, who, unlike the licensee or invitee, enters another person's land without permission or consent in any form. Perpetuation of such an attitude, however, does little to aid the trial courts, which must, to impose liability, struggle with the inconsistencies and fictions inherent in the common law attempts to allow recovery. Foreseeability is one common thread running through all the cases in which the trespasser classification has been avoided. Under the attractive nuisance doctrine, for example, the possessor of land must exercise reasonable care if a condition exists or an instrumentality is maintained which he would reasonably expect to create a risk of serious harm and if he could reasonably foresee that young children would be drawn upon the land by the condition or the instrumentality.¹⁰¹

One commentator suggested therefore, that ordinary negligence principles be substituted for *all* classifications because the finding of negligence is predicated upon foreseeable harm to the plaintiff-entrant.¹⁰² The owner or occupier, then, would be required to act reasonably only if the presence of a trespasser were within the realm of foreseeability. This was the conclusion reached by the trial judge in the Milwaukee County Circuit Court case, *Antoniewicz v. Rezczyński*.

The abolition of trespasser, licensee and invitee distinctions with respect to presence upon private premises would cause no significant changes in other areas of Wisconsin law.

The special duty, prescribed in the safe-place statute,¹⁰³ to make the premises as safe as their nature will reasonably permit,¹⁰⁴ is limited only to places of employment¹⁰⁵ and to public buildings.¹⁰⁶ With any change in premises liability law, safe-place would continue to be treated as a special exception because the statute deals

101. *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 154 N.W. 351 (1934).

102. Wilkins, *The Future of Occupiers Liability to Trespassers in Canada*, 4 ALBERTA L. REV. 447 (1966).

103. WIS. STAT. § 101.11 (1973).

104. *Hrabak v. Madison Gas & Elec. Co.*, 240 F.2d 472 (7th Cir. 1957); *Presti v. O'Donahue*, 25 Wis. 2d 594, 131 N.W.2d 273 (1964).

105. WIS. STAT. § 101.01(2)(a),(b),(c),(d) and (e) (1973).

106. WIS. STAT. § 101.01(2)(h) (1973).

with unsafe conditions and not with negligent acts as such,¹⁰⁷ and because its purpose is to impose a duty greater than that required by the common law¹⁰⁸ upon employers and owners of public buildings for promotion of accident prevention. The reasonable man standard could be used by the court to determine the persons to whom this higher duty is owed.

VI. PROPOSAL FOR A SUITABLE JURY INSTRUCTION

Assuming that a reasonable man standard were adopted as the rule for premises liability in Wisconsin, it would be necessary to draft jury instructions expressing that standard. The following is a suggested set of instructions which could be used in such situations.

Instruction A: Negligence—Duty of owner or occupant of premises

The owner or occupant of the premises is under a duty to exercise ordinary care in the management of the premises in order to avoid exposing persons thereon to danger or harm.¹⁰⁹

Instruction A establishes the standard against which the jury would measure the defendant owner's conduct. The instruction is borrowed from the California Civil Jury Instructions, but the utility of conduct versus the risk of harm balancing test of the Restatement (Second) of Torts section 291 is omitted here to make the instruction consistent with current Wisconsin law. The term "management," as used in the instruction, would pertain to the manner in which the owner or occupant uses the premises¹¹⁰ and would include the duty to maintain and to make necessary repairs.

Instruction B: Owner or occupant not a guarantor of the premises

The owner or occupant, however, is not a guarantor of the safety of persons who come upon the premises.¹¹¹

Instruction B is consistent with the Wisconsin Supreme Court's holding in *Stamberger v. Matthaidess*.¹¹² The purpose of this instruction is to stress to the jury that the defendant has a duty only to exercise reasonable care and is not, therefore, liable under *every*

107. *Gross v. Denow*, 61 Wis. 2d 40, 212 N.W.2d 2 (1973).

108. A. McKinnon, *A Survey of the Safe Place Doctrine*, 46 MARQ. L. REV. 130, 131 (1962).

109. CALIF. J. I.—CIVIL (5th ed.) § 8.00.

110. *Frye v. Ohio Farmers Ins. Co.*, 28 Wis. 2d 575, 137 N.W.2d 430 (1965).

111. *See* Wis. J. I.—CIVIL No. 8020.

112. 37 Wis. 2d 186, 155 N.W.2d 88 (1967).

circumstance or for *every* injury occurring on his premises. The defendant's right to use and enjoy his land must be protected from any unreasonable imposition of liability.

Instruction C: Duty owed by owner or occupant of premises

The owner or occupant of the premises must exercise ordinary care to discover defective or dangerous conditions existing on the premises and to take reasonable and effective steps to remedy them. If he fails to discover and correct conditions which a reasonably prudent person would have discovered under the same or similar circumstances, he fails to exercise ordinary care and is guilty of negligence. . . .¹¹³

Instruction D: Knowledge of the defective or dangerous condition

The owner or occupant of the premises is not liable for an injury or injuries suffered by persons on his premises if such injury resulted from a defective or dangerous condition of which he had no knowledge and of which knowledge could not be gained through the exercise of ordinary care. He (the owner or occupant) also is under no duty to call to the person's attention open, unconcealed or obvious dangers.¹¹⁴

If, however, the condition existed for such a length of time that the owner or occupant in the exercise of reasonable care in inspecting the premises, would have discovered the condition in time to remedy it or to give a warning before an injury occurred, failure to so act constitutes negligence.

If the owner or occupant, exercising ordinary care, discovered the defective or dangerous condition before the time of the injury, but not long enough before to provide him with time reasonably necessary to remedy the condition, he has a duty to warn the entrant of such danger, provided a reasonable man could have done so under the same or similar circumstances.

A warning, if given, must be adequate to enable a reasonably prudent person to take the steps necessary to avoid harm.¹¹⁵

In instruction D, the duty imposed upon the owner or occupant in instruction C is more clearly and specifically explained. Again, the key consideration is the reasonableness of the defendant's conduct.

Instruction E: Factors considered in determining existence of duty

113. This is a modification of the invitee instruction in Wis. J. I.—CIVIL No. 8020.

114. See Wis. J. I.—CIVIL No. 8020.

115. CALIF. J. I.—CIVIL (5th ed.) § 8.00.

In determining if the defendant was under such a duty of care, you are instructed to consider all the surrounding circumstances including, but not limited to, the foreseeability by the owner or occupant of the presence of persons on his land,¹¹⁶ and the time, manner and place of the person's entry onto the land.¹¹⁷ Also to be considered are the likelihood that the owner's or occupant's conduct would cause an injury and the possibility of serious injury if one should, in fact, occur.¹¹⁸

Instruction E is derived from premises liability cases in which the reasonable man standard was used. This instruction would, hopefully, establish an analytical framework from which the jury could assess the reasonableness of the defendant's conduct and determine whether he fulfilled his duty of ordinary care.

Critical in a comparative negligence jurisdiction such as Wisconsin would be a contributory negligence instruction. As explained in Wisconsin Civil Jury Instruction No. 1007, the plaintiff must take precautions to avoid an injury to himself as would be taken by an ordinarily prudent person in a similar situation at and immediately prior to the accident.

The jury should be instructed to consider all circumstances surrounding the injury. This consideration could include a determination of whether the plaintiff knew or should have known the nature of the use of the premises, a determination as to the likelihood that the plaintiff's conduct on the premises would result in his injury, a determination of whether the plaintiff received a warning and the adequacy of the warning, and whether the defect causing the injury was open and obvious or was concealed. These factors could serve as starting points for the jury's inquiry into the question of contributory negligence.

It should be noted that in a situation where a child is the entrant upon the land and the subsequent plaintiff, additional instructions should be given regarding the child's age, capacity, discretion, knowledge and experience, and the duty to exercise the same degree of care ordinarily exercised by a child possessing like qualities and faced with the same or similar circumstances.¹¹⁹ In this situation, an instruction could also be given regarding the parents' duty

116. 469 F.2d at 106 & n. 48.

117. ____ Mass. ____, 297 N.E.2d at 52.

118. 469 F.2d at 105.

119. Wis. J. I.—CIVIL No. 1010.

to protect and (supervise) their minor child (the plaintiff) by taking reasonable precautions for his or her safety.¹²⁰

VII. CONCLUSION

The present system of classification with respect to trespassers, licensees and invitees is outmoded because, despite the development of numerous distinctions and refinements it fails to adequately reflect the societal shift to placing protection of human life above the sanctity of private property.

Most jurisdictions continue to cling to the common law approach, relying on concepts and values developed in feudalism. As Justice Holmes said:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹²¹

The Wisconsin Supreme Court in *Terpstra* has indicated a willingness to review the traditional classifications of trespassers, licensees and invitees in the context of modern social trends. The dignity of the human could be elevated over the dignity of property interests in the court's review. Such a review in the near future could place Wisconsin among the early jurisdictions to abolish the outmoded concepts for determining the liability of owners and occupiers of land.

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120. Wis. J. I.—CIVIL No. 1012.

121. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).